

STATE OF MICHIGAN
COURT OF APPEALS

PETER TOAL,

Plaintiff-Appellant,

v

KATHLEEN TOAL,

Defendant-Appellee.

UNPUBLISHED

April 20, 2010

No. 289435

Genesee Circuit Court

LC No. 04-252661-DM

PETER TOAL,

Plaintiff-Appellant,

v

KATHLEEN TOAL,

Defendant-Appellee.

No. 291267

Genesee Circuit Court

LC No. 04-252661-DM

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals by right that portion of the circuit court's opinion and order requiring him to pay defendant's attorney fees in the amount of \$26,188.50. Plaintiff also appeals by leave granted that portion of the circuit court's opinion and order imputing income to him in the amount of \$350,000 for the purpose of calculating child support. For the reasons set forth in this opinion, we affirm in all respects.

I

The parties were married in July 1989 and lived in Glenview, Illinois. Plaintiff worked as an investment banker in Chicago, and defendant was a stay-at-home mother. The parties had three children during the marriage.

In 2003, plaintiff was apparently terminated from his investment-banking job in Chicago, and the parties thereafter relocated to Flushing, Michigan. The parties agreed that they would both attempt to obtain teaching jobs in the Flushing area. They also agreed that although

plaintiff would take a substantial pay cut as a teacher, they had enough savings and investment income to support the family. Plaintiff obtained a permanent teaching job and a coaching position with area schools, and defendant obtained a job substitute teaching.

Defendant filed for divorce in September 2003, and plaintiff filed his own complaint for divorce in March 2004. The two pending matters were consolidated by order of the circuit court in November 2004. The parties were divorced pursuant to a consent judgment entered on February 28, 2005, with an effective date of September 1, 2006. Under the original consent judgment, neither party was obligated to pay child support, and each party was to share equally in the support of the children.

Thereafter, believing that defendant was required under the divorce judgment to reimburse him for certain expenses that he had paid for the children, plaintiff filed a motion seeking reimbursement for certain expenses and costs. In response, defendant filed a motion for child support and attorney fees. Following several days of testimony spread out over a number of months, the referee recommended that plaintiff should be ordered to pay defendant monthly child support, in addition to \$26,188.50 in attorney fees.

The referee heard the testimony of several witnesses and reviewed numerous exhibits. The referee found that plaintiff had earned \$693,776 in 2002, his last full year as an investment banker. The referee also found that plaintiff was an equity holder in his former company, Chilmark, from which he continued to receive substantial additional distributions. In contrast, the referee found that defendant, as a stay-at-home mother, had earned no annual salary during the final years of the marriage. The referee noted that plaintiff was presently employed by the Mount Morris Schools, earning a salary of \$39,875 in 2006. Plaintiff also earned an additional \$2,300 per year as a coach. Defendant was presently employed as a substitute teacher, and made \$16,467 in 2006. A vocational expert testified that plaintiff would be able to earn at least \$355,843 per year, plus bonuses, with his education and experience in the investment-banking field. On the basis of this testimony, the referee recommended that an annual income of \$350,000 should be imputed to plaintiff, and that plaintiff should be required to pay monthly child support to defendant based on this imputed amount.

The referee went on to consider the issue of attorney fees. The referee pointed to defendant's testimony that plaintiff had told her that he "would continue the litigation until [defendant] runs out of money." We acknowledge that plaintiff filed numerous motions in this matter, some of which were duplicative and redundant. We also acknowledge that plaintiff failed to turn over requested financial information and failed to comply with certain discovery orders entered by the circuit court. In the end, the referee recommended that plaintiff "should be required to pay the attorney fees of [d]efendant," and found that plaintiff was "purposely causing [defendant] to incur additional attorney fees through continuous litigation and his failure to follow court orders." Moreover, the referee observed that "[p]laintiff has the ability to pay the attorney fees and [d]efendant does not." The referee recommended that plaintiff be ordered to pay defendant's total attorney fees in the amount of \$26,188.50.

Plaintiff filed written objections to the referee's recommendations and requested a "de novo" hearing before the circuit court. On December 4, 2008, the circuit court issued a written opinion and order adopting the referee's recommendations and denying plaintiff's objections to the recommendations.

In Docket No. 289435, plaintiff appeals by right that portion of the circuit court's opinion and order adopting the referee's recommendations with respect to the matter of attorney fees. In Docket No. 291267, he appeals by leave granted that portion of the circuit court's opinion and order adopting the referee's recommendations concerning the imputation of income for the purpose of calculating child support. This Court has consolidated the appeals.

II

In Docket No. 289435, plaintiff argues that the circuit court erred by adopting the referee's recommendations and ordering him to pay defendant's attorney fees in the amount of \$26,188.50. Plaintiff asserts that this award of attorney fees for defendant was improper because (1) there was no showing that defendant's requested attorney fees were attributable to plaintiff's misconduct, and (2) the circuit court did not consider whether the requested amount of \$26,188.50 was reasonable before ordering plaintiff to pay. We disagree.

We review for an abuse of discretion the circuit court's award of attorney fees in a divorce action. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). However, all factual findings underlying the circuit court's award of attorney fees are reviewed for clear error, and any controlling questions of law are reviewed de novo. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). An abuse of discretion occurs only when the circuit court's decision falls outside the range of reasonable and principled outcomes. *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). A finding of fact is not clearly erroneous unless we are left with the definite and firm conviction that a mistake has been made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

In divorce cases, the circuit court may order one party to pay the other party's attorney fees under certain circumstances. MCL 552.13; MCR 3.206(C)(2); *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). For example, attorney fees may be awarded when one party has been forced to incur legal expenses as a result of the other party's unreasonable conduct or failure to comply with discovery orders. MCR 3.206(C)(2)(b); *Reed*, 265 Mich App at 165. However, to recover attorney fees in such a case, the innocent party must establish precisely which attorney fees he or she incurred as a result of the other party's misconduct. *Id.* "Further, the fact that litigation has been lengthy is not by itself reason to conclude misconduct has occurred." *Id.* In this matter, it is clear that there was some misconduct by plaintiff. It is undisputed that plaintiff failed to comply with certain discovery orders entered by the circuit court, and he appears to have unnecessarily prolonged the litigation as well. This would certainly warrant an award of any attorney fees incurred by defendant as a direct result of plaintiff's actions and behavior. *Id.* However, it would not necessarily warrant an award of defendant's total attorney fees, amounting to \$26,188.50. Surely, defendant did not incur *all* of these fees as a result of plaintiff's misconduct.

Nevertheless, as the referee and circuit court correctly observed, attorney fees are also awardable in domestic relations cases on the basis of a party's financial need. MCL 552.13; *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). Indeed, as this Court has previously noted, "[n]ecessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action." *Stallworth*, 275 Mich App at 288. Turning to the present matter, the record amply supported the referee's finding that "[p]laintiff has the ability to pay the attorney fees and [d]efendant does not." The referee and court found that plaintiff was

not only earning a substantially higher salary than defendant at the time, but that he also had additional investment income that defendant did not. These findings were not clearly erroneous. See *Draggou*, 223 Mich App at 429. Because an award of attorney fees for defendant was necessary to preserve defendant's ability to carry on and defend the action, the circuit court did not abuse its discretion by adopting the referee's recommendation and ordering plaintiff to pay defendant's attorney fees in this case. *Stallworth*, 275 Mich App at 288.

Plaintiff argues on appeal that even if the circuit court correctly ordered him to pay some of defendant's attorney fees, the actual amount awarded for defendant, \$26,188.50, was unreasonable. As plaintiff correctly observes, only "reasonable" attorney fees may be awarded in a divorce action, and "[t]he party requesting attorney fees bears the burden of proving they were incurred, and that they are reasonable." *Reed*, 265 Mich App at 165-166 (citations omitted). "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Id.* at 166.

The obvious problem with plaintiff's argument in this regard is that it has not been preserved for appellate review. Plaintiff argued before the referee and the court that he should not be required to pay any of defendant's attorney fees in this matter because he did not engage in any misconduct or discovery violations that would warrant such an award for defendant. He also argued at the circuit court's evidentiary hearing that, in light of his meager salary as a teacher and coach, any award of attorney fees for defendant would impoverish him. However, plaintiff never specifically argued, in as many words, that the amount of attorney fees requested by defendant was "unreasonable." The issue of reasonableness was simply never raised.

In general, an issue is not preserved for appellate review if it was not raised before and decided by the court below. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). We decline to consider further plaintiff's unpreserved claim concerning the reasonableness of the attorney fee award, which has been raised for the first time on appeal. *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000); *Garian v Highland Park*, 176 Mich App 379, 382; 439 NW2d 368 (1989).¹

¹ It is true that plaintiff did state in his written objections to the referee's recommendations that the attorney fees requested by defendant were "excessive." But even if this solitary statement could somehow be considered sufficient to have preserved the issue of reasonableness for appellate review, we note that plaintiff never presented evidence in opposition to any of the specific requested fees; nor did he ever attempt to prove or demonstrate that the amount of fees requested by defendant was in any way unreasonable. By effectively acquiescing in the specific requested amount of \$26,188.50 before the circuit court, plaintiff has waived appellate review of this issue. *Hilgendorf v St John Hosp & Med Center Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001).

III

In Docket No. 291267, plaintiff argues that the circuit court erred by ordering him to pay child support based on an imputed annual income of \$350,000, rather than his true annual income of \$40,000. Specifically, plaintiff asserts that although he was formerly an investment banker, earning \$350,000 or more per year, he had since given up his investment-banking career and become a school teacher, with a much more meager annual salary. He contends that the referee and circuit court erred (1) by imputing to him his former income as an investment banker rather than his present income as a teacher and coach, (2) by deviating from the Michigan Child Support Formula Manual (MCSF), and (3) by failing to articulate a sufficient reason for deviating from the MCSF. He points out that he had already switched from his former investment-banking career to his new teaching career at the time of the court's child support determination, and asserts that the facts of this case did not support the court's imputation of a \$350,000 annual salary. Again, we disagree.

We review for an abuse of discretion the circuit court's decision to award child support, *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000), and to impute income to a party, see *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). Any underlying findings of fact are reviewed for clear error. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

We cannot conclude that the circuit court abused its discretion by adopting the referee's recommendation that plaintiff should pay monthly child support based on an imputed annual income of \$350,000. Both Michigan's caselaw and the MCSF clearly grant the circuit court discretion to impute additional, unearned income to a parent. *Stallworth*, 275 Mich App at 285; 2008 MCSF 2.01(G). It is well settled that "when a party voluntarily reduces or eliminates income, and the . . . court concludes that the party has the ability to earn an income and pay child support, the court does not err in entering a support order based upon the unexercised ability to earn." *Olson v Olson*, 189 Mich App 620, 622; 473 NW2d 772 (1991); see also *Rohloff*, 161 Mich App at 776. In particular, this Court has held that a circuit court may properly consider a party's "income *potential*" when determining child support, *id.* at 770, and that a court does not abuse its discretion "by entering a child support order based upon the income [a party] received before voluntarily leaving [his or her] employment," *id.* at 776.

In the case at bar, the evidence established that plaintiff had earned well over \$600,000 in his final year as an investment banker, that he had other substantial assets and investments, and that he continued to receive distributions from Chilmark, his former company in which he owned equity. Moreover, a vocational expert testified that plaintiff had a current potential to earn at least \$350,000 per year, based on his training and experience in the field of investment banking. This Court must give due regard to the special opportunity of the referee and circuit court to weigh the testimony and judge the credibility of the witnesses. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In short, the record in this matter adequately supported the referee's finding that plaintiff had other assets and investments in addition to his teaching salary, that he continued to receive distributions from his former company, and that he had the present capacity to earn \$350,000 per year. Therefore, the circuit court did not abuse its discretion by adopting the referee's recommendations on this issue and imputing to plaintiff an annual income of \$350,000 for the purpose of calculating child support.

Further, despite plaintiff's protestations to the contrary, we find no evidence that the referee or circuit court deviated from the MCSF in this case. As noted previously, the MCSF specifically permits the imputation of additional, unearned income to one or both parents. Indeed, as this Court stated in *Stallworth*, 275 Mich App at 284-285 (internal citations omitted):

[L]ongstanding Michigan caselaw permits a court to impute income to a parent on the basis of the parent's unexercised ability to pay when supported by adequate fact-finding that the parent has an actual ability and likelihood of earning the imputed income. Consistent with this caselaw, the MCSF grants a court the discretion to impute income to a parent, which the manual defines as "treating a party as having income or resources that the individual does not actually have." "This usually occurs in cases where there is a voluntarily [sic] reduction of income or a voluntary unexercised ability to earn."

Here, the evidence plainly established that plaintiff voluntarily reduced his income when he relocated to Michigan and left the investment-banking industry. Moreover, credible testimony showed that plaintiff had an unexercised ability to earn far more than he was presently earning as a teacher and coach. We simply cannot conclude that the circuit court deviated from the MCSF in this case. Quite the opposite, it appears to us that the court's decision to impute income to plaintiff fully conformed to the MCSF's mandates and guidelines, and we must therefore reject plaintiff's claim to the contrary.² See 2008 MCSF 2.01(G).

In sum, neither the referee nor the circuit court clearly erred by finding that plaintiff had a present, unexercised ability to earn \$350,000 per year. Hence, the circuit court did not abuse its discretion by imputing this income to plaintiff for child-support-calculation purposes. *Rohloff*, 161 Mich App at 776.

IV

In Docket No. 289435, we affirm the circuit court's order requiring plaintiff to pay defendant's attorney fees in the amount of \$26,188.50. In Docket No. 291267, we affirm the circuit court's imputation of income to plaintiff for the purpose of calculating child support.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

² In light of our conclusion that the circuit court did not deviate from the MCSF in this case, we need not consider plaintiff's additional argument that the court was required by statute to specifically articulate its reasons for deviating.